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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 743

NICHOLAS A. STIRONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–14) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1962 (Pet. App. 15). A petition for rehearing was denied on December 17, 1962 (Pet. App. 16). The petition for a writ of certiorari was filed on January 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly retried under the original indictment after his prior conviction thereunder had been reversed on the ground that the trial court had submitted to the jury an issue not alleged in the indictment.

2. Whether petitioner was properly convicted on evidence within the scope of the indictment.

3. Whether, although petitioner made no objection, there was error in the charge to the jury.

4. Whether the evidence supports the verdict that petitioner extorted money by putting the victim in fear.

STATUTE AND RULE INVOLVED

The Hobbs Act, 62 Stat. 793, 18 U.S.C. 1951, provides in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by * * * extortion * * * or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> * * * * *

Rule 30, F.R. Crim. P., provides in pertinent part as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

STATEMENT

Petitioner was charged in an indictment returned in the United States District Court for the Western District of Pennsylvania with violation of the Hobbs Act, 62 Stat. 793, 18 U.S.C. 1951 (*supra*, p. 2) in that he had extorted more than $30,000.00 from one Rider as a result of threats of labor disputes and threats of causing the loss of, or obstructing and preventing Rider's performance of, a contract for the supply of ready-mixed concrete, in the mixing of which Rider used sand which had moved in interstate commerce (R. 13a–15a).[1] In *Stirone* v. *United States*, 361 U.S. 212, this Court reversed petitioner's original conviction as affirmed by the Third Circuit (262 F. 2d 571) on the ground that the trial judge had submitted to the jury an issue not charged in the indictment. On retrial, the jury again found

[1] "R. —a" refers to the appellant's appendix and supplemental appendix filed in the court of appeals.

petitioner guilty (R. 295a). The court sentenced him to imprisonment for ten (10) years and a $10,000.00 fine, with the provision that he be eligible for parole at such time as the board of parole might determine under 18 U.S.C. 4208(a)(2) (R. 304a–305a, 311a–312a). On appeal the conviction was affirmed (Pet. App. 15).

Evidence adduced by the government may be summarized as follows:

1. In September 1951, Rider was in the business of selling ready-mixed concrete at Belle Vernon, Pennsylvania (R. 29a, 33a). By a written contract dated September 25, 1951 (Gov. Ex. 1), Rider agreed to furnish concrete to Ragnor-Benson, Inc., the general contractor for construction of a steel mill for the Pittsburgh Steel Company at Allenport, Pennsylvania (R. 30a–31a, 18a). In making the concrete used in fulfilling this contract Rider used sand which had been dredged in the Ohio River in West Virginia and Ohio and had moved in interstate commerce to the Duquesne Slag Products Company's dock and then to Rider's concrete batching plant at Belle Vernon, Pennsylvania (R. 33a–34a, 44a, 118a–120a, 123a–129a, 134a–137a, 140a–141a).

Prior to the written contract, dated September 25, 1951, Rider had learned from the newspapers that Ragnor-Benson had obtained the contract for building the Allenport mill.[2] Rider spoke with Kassab, the vice-president of Ragnor-Benson, about getting the

[2] The date of the Ragnor-Benson contract with the Pittsburgh Steel Company was August 29, 1951 (R. 18a).

contract to furnish concrete and was told that he "had the contract". (R. 31a–32a, 47a–48a, 50a, 71a, 82a). Rider made his first delivery of concrete to Ragnor-Benson for the Allenport mill on September 13, 1951 (R. 38a, 50a–51a, 60a–61a, 83a–85a).

A short time later but still prior to the written contract of September 25, 1951 (R. 60a), Dierker, the president of Duquesne Slag Products Company, asked Rider to meet him at Rider's batching plant at Belle Vernon (R. 35a, 51a–52a, 56a). When Rider arrived, Dierker introduced him to the petitioner. Rider sat in the back seat of Dierker's car with the other two men in front (R. 35a, 58a). At that time Rider employed union men as drivers, crane operators and batchmen, and knew that the petitioner was high in labor circles in and around Pittsburgh (R. 38a, 57a, 16a–18a). The petitioner said that he wanted Rider to pay 50 cents a yard for all concrete on the Ragnor-Benson job going into the Allenport mill, so that Rider could hold onto his contract and keep out of labor trouble, and that if Rider did not pay, the petitioner would just tell Kassab or Ragnor-Benson to take the contract away from him (R. 36a, 58a, 59a, 68a, 69a). Rider became angry, stated he could not make a profit with the payments demanded, and left the car. Dierker went after Rider and told Rider that he had to go along. Dierker promised adjustments on the price of materials (which Rider never obtained). Rider then said the arrangement was "okay" since there was nothing else he could do (R. 36a, 59a–60a, 63a). Rider testified

that he was afraid that, by reason of the petitioner's powerful position as the head of various unions, he would lose his contract with Ragnor-Benson and would not get any other jobs (R. 37a, 69a–70a).

Petitioner told Rider that he wanted the payments in cash and did not want them to start until after the beginning of the year 1952 (R. 39a–40a, 63a). Rider told his wife, who acted as bookkeeper for his business, that they were to pay 50 cents per yard for concrete on the Ragnor-Benson job in accordance with petitioner's demands, in order to avoid having labor trouble or losing their contract (R. 88a–91a). Fifteen checks, dated from September 4, 1952 to December 31, 1953 (Gov. Ex. 5), were issued by Mrs. Rider to petitioner (R. 87a–88a). Payments to the petitioner totaling more than $30,000.00 were shown on the books as commissions (R. 96a). Upon completion of the Ragnor-Benson contract in 1954 Rider still owed the petitioner about $1,400 under the arrangement for payments (R. 41a). When Rider's company was thrown into involuntary bankruptcy by his creditors, he did not list the petitioner as a creditor because he did not think the petitioner was entitled to a claim for this money (R. 42a, 145a–146a).

2. Petitioner denied the meeting at Belle Vernon with Rider and Dierker and denied any threats to cause Rider to lose the Ragnor-Benson contract or to cause him labor trouble (R. 174a). Petitioner's version was that Dierker wanted to get the contract for Rider, and that petitioner, who knew Kassab, arranged

to get the contract for Rider at a commission which was fixed at 50 cents per yard (R. 175a–178a; 203a, 212a). Petitioner claimed as an alibi that he was in San Francisco from September 9 to September 20, 1951 (R. 183a, 191a–193a).

Dierker supported petitioner's version (R. 222a–227a). Kassab testified as a defense witness that the petitioner intereeded on behalf of Rider for the Ragnor-Benson concrete contract, and that, after being assured by Dierker and the petitioner that Rider could perform the contract, he (Kassab) awarded the contract to Rider (R. 260a–262a). Kassab, who stated that he was friendly enough to the petftioner that he would be willing to do him a favor (R. 267a), testified that he gave the contract to Rider since he was low bidder and also on the petitioner's recommendation (R. 269a–270a).

ARGUMENT

1. There is no substance to petitioner's contention that since the court on the first trial submitted to the jury an issue not charged in the indictment, the original indictment was "amended" so as to render it ineffective in the absence of the return of a new indictment (Pet. 14–19).[3] The judge's erroneous charge at the first trial did not change the allegations of the indictment returned by the grand jury, and

[3] Prior to the second trial petitioner had unsuccessfully moved to dismiss the indictment on this ground and the court of appeals had dismissed his appeal for want of jurisdiction (R. 9a, 10a, 19a). This Court denied a petition for a writ of certiorari. *Stirone* v. *United States*, 365 U.S. 871.

it was under those allegations alone that petitioner was tried. Since there were no defects in the original indictment, there was no need to resubmit the issues to a new grand jury (Pet. App. 3). In *Ex Parte Bain*, 121 U.S. 1, and in the decision reversing petitioner's previous conviction, *Stirone* v. *United States*, 361 U.S. 212, this Court merely held that a defendant could not be tried on a theory not covered by the indictment returned by the grand jury. In neither case was there a holding that the defendants could not properly be retried and convicted on the original indictment as it stood prior to the improper alteration or enlargment by judicial interpretation. Here petitioner was tried on the indictment as the grand jury had returned it.[4]

2. There is no merit in the contention that since Rider testified that petitioner's threats made him fear the loss of future jobs or contracts as well as the Ragnor-Benson contract, petitioner may have been convicted of a charge outside the scope of the indictment. Nowhere in the charge did the court instruct that petitioner could be convicted by reason of fear of loss of future contracts. The instruction made conviction possible only if Rider's payments were

[4] In *Russell* v. *United States*, 369 U.S. 749, the issue was whether the indictment as returned by the grand jury was sufficiently specific to inform the defendant of the charge as to one element of the offense. There is no claim here that the indictment failed in specificity as to any element of the offense. In *United States* v. *Norris*, 281 U.S. 619, it was held that an indictment could not be enlarged by adding particulars contained in a stipulation of facts. No attempt was made in this case to enlarge the indictment.

caused by "fear of loss of his contract" as charged in the indictment (R. 286a, 283a).

Rider's testimony that, by reason of petitioner's threats, he feared the loss of future contracts as well as the Ragnor-Benson contract was given in response to cross-examination by both the court and petitioner's counsel (R. 69a–71a). This testimony was properly admitted to show the state of mind of the victim being subjected to extortion. *Bianchi* v. *United States*, 219 F. 2d 182, 192 (C.A. 8), certiorari denied, 349 U.S. 915; *Nick* v. *United States*, 122 F. 2d 660, 671 (C.A. 8), certiorari denied, 314 U.S. 687; *United States* v. *Compagna*, 146 F. 2d 524, 528–529 (C.A. 2), certiorari denied, 324 U.S. 867; *United States* v. *Kennedy*, 291 F. 2d 457, 458 (C.A. 2). No theory of the loss of future contracts was submitted to the jury.

3. The various criticisms directed at the court's charge to the jury (Pet. 24–28) are not warranted. When the charge is read in its entirety it is clear that the court properly stated the law involved.

Defense counsel may not sit back, make no objections to the court's charge, request no instructions on his particular theories of defense (R. 293a), and then, after conviction, successfully urge that the failure to give instructions thereon was error. Rule 30, F.R. Crim. P.; *Humes* v. *United States*, 170 U.S. 210, 211–212; *Apel* v. *United States*, 247 F. 2d 277, 282–283 (C.A. 8). The judge did not purport to give a complete summary of the evidence in his charge, nor was he requested by either side to do so. Absent a specific request, the court was not required to give instructions on each theory of defense which had been

argued to the jury, such as alibi or the claim that the payments were reasonable commissions. See *Goldsby* v. *United States*, 160 U.S. 70, 77; *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (C.A. 2), certiorari denied, 344 U.S. 864.

The charge did require a finding that Rider feared loss of his contract by reason of petitioner's threats. Shortly after referring to fear of economic loss as an element of extortion, the court instructed, "Now, if you find that to exist, under the statute, and beyond a reasonable doubt, why, then, extortion has been committed" (R. 286a). This clearly required the jury to make a finding that Rider feared economic loss from the petitioner's threats. Such a requirement was also implicit in other parts of the charge that the jury must find that petitioner obtained the money from Rider "with his consent, which was induced by fear, as defined in the statute" (R. 283a); referring to the statutory definition of extortion as including fear (R. 285a); and stating that "each of the elements making up extortion [of which fear was one] must be proved beyond a reasonable doubt to have the guilt established by the Government" (R. 288a).[5]

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[5] The judge's charge (R. 290a–291a) cannot fairly be read as telling the jury that Mrs. Rider testified that she was present in Dierker's car when the petitioner made his threats to Rider. Mrs. Rider gave no such testimony, the prosecution at no time claimed that she did, and the jury could not have had the impression that she was there at the time. The charge stated that it was Rider who said that he was present in Dierker's car, but that Dierker and the petitioner denied that this meeting ever occurred, thus giving rise to a direct conflict in the evidence.

4. Petitioner argues in effect that the evidence to support his conviction is insufficient since it did not show that he had jurisdiction over Rider's employees and hence Rider could not reasonably have entertained any reasonable fear that petitioner's threats would cause him trouble (Pet. 28–31). According to Rider's testimony, however, petitioner threatened Rider that, if the demanded payments were not met, petitioner would see to it that Rider did not get the Ragnor-Benson contract, as to which Rider had an oral commitment from Kassab, but not a written contract. The jury had the right to believe that, whatever the source of his power, petitioner could control the ultimate award of the contract. Kassab himself, as a defense witness, testified that the contract was awarded to Rider after Dierker and petitioner assured him that Rider could perform. Whether petitioner's threats put Rider in fear was an issue submitted to the jury, and the jury, by their verdict, indicated that they found that petitioner did extort the money through threats and fear.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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